In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY,
a Corporation,

Petitioner,

vs.

CHARLES M. GILLIO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES ELLIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT ALBERT EUFRAZIA.

ARCHIBALD MADISON MULLY, JR.,
[illegible]
Attorney for Respondent
Albert Eufrazia

THOMAS C. PERKINS,
[illegible]
Of Counsel.

Subject Index

	Page
Questions presented for review	2
Statement of the case	3
Argument	6
I. The decision by the Supreme Court of California is clearly correct	6
II. The decision below turns upon its own facts	7
Conclusion	9

Table of Authorities Cited

Cases

	Page
Baird v. New York Central, 299 N.Y. 2d 13, 86 N.E. 2d 567	6
Erickson v. Southern Pacific Company, 39 Cal. 2d 374, 246 Pac. 2d 642, certiorari denied, 344 U.S. 897	6
Trucco v. Erie Railway Company, 353 Pa. 320, 45 A. 2d 20	6

Statutes

Federal Employers Liability Act of April 22, 1908, Section I (c. 149, Section 1, 35 Stat. 63, as amended by the Act of August 11, 1939, c. 685, Section 1, 53 Stat. 1404 (45 U.S.C. Section 1))	7

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY,
a Corporation,
Petitioner,

vs.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES ELK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY RESPONDENT ALBERT EUFRAZIA.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable the Associate Justices of the United States:

Now comes the Respondent, Albert Eufrazia, and in opposition to Appellant's Petition for Certiorari on file herein, respectfully submits:

QUESTIONS PRESENTED FOR REVIEW.

I. Is an advanced carman's helper (Respondent Albert Eufrazia) who is injured on duty through the negligence of his employer (Appellant Southern Pacific Company), a common carrier by railroad, entitled to maintain an action for damages under the Federal Employers Liability Act when his duty at the time of his injury consists of building new railroad cars, some of which are destined to be used in interstate commerce by his employer, and the rest of which are destined to be used by the Texas and New Orleans Railroad Company, which is a subsidiary entirely owned by the employer?

II. If the above question is answered in the negative then a second issue remains:

Is the injured employee (Respondent Albert Eufrazia), nevertheless, entitled to maintain an action for damages under the Federal Employers Liability Act when approximately a month prior to the date of his injury he was employed in the repair of railroad cars which were already in interstate commerce, both the repair work and the new construction work being carried on at the employer's (Appellant Southern Pacific Company) Shop 9, which was under the general supervision of the same supervisor (Mr. Hitke) whose foreman (Mr. Fagan), in charge of the injured employee, simultaneously supervised both repairs and new construction and when the employees, including the injured employee, have the right under a collective bargaining agreement to bid back and forth from one activity to the other on a seniority basis and are

from time to time shifted from one activity to the other?

STATEMENT OF THE CASE.

The Appellant started to work for the Southern Pacific Company in September 1950, at which time he was employed as a carman's helper (R 10*). In March, 1951, he was promoted to an advanced carman's helper (R 16). A carman is defined as one who builds and repairs raflway cars (R 37). While so employed the Respondent was injured on July 10, 1951 (R 9). At all times herein referred to the Respondent was employed in Appellant's Car Shop 9 which was the designation for Appellant's freight car department at its Sacramento shops. Car Shop 9 was one department and was not sub-divided into subdivisions. The Supervisor of Car Shop 9 was Mr. Hitke whose sole duty was to supervise all of the activities carried on in Car Shop 9. The work of Car Shop 9 was confined to all of the work on freight cars as distinguished from passenger cars in the Sacramento Southern Pacific Company shops. Included in this work was the building of new railway cars as well as the repair of railway cars which were already in service in interstate commerce. The foremen under Mr. Hitke supervised both new construction and repairs simultaneously. At the time Respondent was

---

*References to transcript refer to Reporter's Transcript before the Supreme Court of California.

injured his foreman, Mr. Fagan, was supervising both repairs and new construction simultaneously (R 155 and 156). Both the building of new cars and the repair of old ones was carried out in the same location. Appellant's Exhibit "L", photograph 4 portrays an assembly line for the construction of new cars and immediately next to the assembly line is a string of old freight cars, including one obviously badly side-swiped, in for repairs. These old cars are standing right next to the assembly line for new cars.

A carman or his helper could bid from new car construction to repair work, or vice versa (R 154). The carmen and their helpers could be and were taken from repair work and placed on new car construction or vice versa, as the need arose (R 142 and 143). When the new assembly line building new cars shut down on several instances, all of the men which had been on the assembly line were ordered to repairs. (R 141).

The Respondent was employed to perform repair work on cars already in interstate commerce prior to June 13, 1951 (R 24). This was slightly over a month before he was injured. At the time that Respondent was injured he was assembling the ends for new gondola cars (R 15). These ends were assembled under a program of building 1000 gondola cars which were assembled at the rate of 18 per day (R 138). After the plaintiff performed his job on the ends they were conveyed by Southern Pacific Company locomotives to a location where they would be applied to the gondola cars (R 87). The Southern

Pacific Company had a contract to assemble these gondola cars for the Southern Pacific Equipment Company, a subsidiary corporation entirely owned by the Southern Pacific Company (R 99). The Southern Pacific Company would charge the Southern Pacific Equipment Company for the cost of the labor used on the gondola cars and in addition would charge six per cent (6%) of the labor costs for the use of its shop facilities and also would charge the Southern Pacific Equipment Company for the cost of materials it supplied. The wheels for the cars were molded in the Southern Pacific Company's shops in Sacramento from old wheels which had come from cars which had been in the service of the Southern Pacific Company (R 138). The Southern Pacific Equipment Company assigned the contract to George Smith and W. J. Wiley as trustees for the Pennsylvania Company for Banking and Trusts, which company would finance the assembling of the gondola cars. On completion of the cars the Pennsylvania Company for Banking and Trusts would lease the cars to the Southern Pacific Company under a lease which provided that the Southern Pacific Company had the immediate use of the cars and that the title to the cars would vest in the Southern Pacific Company when the Southern Pacific Company had repaid the Pennsylvania Company for Banking and Trusts, the amount lent by the latter company (R 119). The Southern Pacific Company subleased some, but not all of the 1000 gondola cars, to the Texas and New Orleans Railway (R 114), which is a subsidiary of, and

entirely owned by the Southern Pacific Company (R 117). The cars not subleased to the Texas and New Orleans Railway would be used in the service of the Southern Pacific Company in interstate commerce (R 121). At all times plaintiff was employed by the Southern Pacific Company. At all times, both while working on repairs and while working on the new gondola ends, plaintiff's time card stated "Freight Car Repairs" (R 68). While assembling the ends, however, the number of the program would also be indicated on the time cards.

ARGUMENT.

I.

THE DECISION BY THE SUPREME COURT OF CALIFORNIA IS CLEARLY CORRECT.

The protection of the Federal Employers Liability Act should not be confined to railroad employees who are aboard moving trains, but should extend to railroad employees on whose activities the running of trains depends. All railroad employees engaged in providing equipment necessary for the movement of trains should be entitled to the protection of the Federal Employers Liability Act whether they are providing new parts, *Trucco v. Erie Railway Company*, 353 Pa. 320, 45 A. 2d 20; *Baird v. New York Central*, 299 N.Y. 2d 13, 86 N.E. 2d 567; or new ties *Erickson v. Southern Pacific Company*, 39 Cal. 2d

374, 246 Pac. 2d 642, certiorari denied 344 U.S. 897, or new cars. The movement of trains in interstate commerce is dependent upon the activities of all of the railroad employees engaged in the above activities. Conversely the railroad in employing men to provide itself with equipment upon which the movement of trains depends is engaged in the activity of a common carrier by railroad. The duties of railroad employees engaged in the above activities in the words of Section 1 of the Federal Employers Liability Act of April 22, 1908, c. 149, Section 1, 35 Stat. 63, as amended by the act of August 11, 1939, c. 685, Section 1, 53 Stat. 1404 (45 U.S.C. Section 1), are in the "Furtherance of interstate or foreign commerce"; and "Directly or closely and substantially affect such commerce".

II.

THE DECISION BELOW TURNS UPON ITS OWN FACTS.

The Respondent was injured while employed as an advanced carman's helper by the Southern Pacific Company in its freight car department at Sacramento, California. This freight car department engaged in both the activities of repairing freight cars which were already in interstate commerce and in building new freight cars which were destined for interstate commerce. This particular freight car department operated as an integrated whole and was not subdivided into subdivisions. One supervisor super-

vised all of the activities of the freight car department and the foreman under him attended to both repairs and new construction. The carmen and their helpers were interchangeable between repairs and new construction. The repair of old cars and the building of new ones was carried out side by side by workmen who were engaged in similar activities. Some were welding on new cars and others were welding on old cars which were in for repairs. Some would be reaming holes in new cars and others would be reaming holes in old cars. The same would apply to painting, riveting and all other skills of the carmen craft. The plaintiff was qualified in all skills of the carmen craft. The decision of the Supreme Court of California is in no way unique or remarkable, but coincides with what any other sound Court would have decided under the particular facts involved.

To hold that a carman is not under the Federal Employers Liability Act because at the time of his injury he happens to be reaming holes in new construction work while his fellow employee, several feet away, doing exactly the same thing on old cars, is under the Federal Employers Liability Act would hopelessly confuse the men employed by the Southern Pacific Company at its Car Shop 9 at Sacramento, California and would lead to results which would be impossible for the attorneys representing these men to explain to them.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, Sacramento, California,
August 12, 1955.

Respectfully submitted,
ARCHIBALD MARISON MULL, JR.,
Attorney for Respondent
Albert Eufrazia.

THOMAS C. PERKINS,
Of Counsel.